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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 653

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

JOHN G. DARBY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

LUCIEN H. MERCIER,
Counsel for Appellee.

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STATEMENT IN OPPOSITION TO JURISDICTION.

I.

The right to proceed by direct appeal to the Supreme Court of the United States only lies where the *validity* or *construction* of the pertinent statute is involved. No such question here arises, since the de-

murrer raised solely the question of the sufficiency of the indictment to charge a crime under the statute.

United States v. *Denison*, 60 App. D. C. 71, 74;
United States v. *Stevenson*, 215 U. S. 190;
United States v. *Carter*, 231 U. S. 492 (involving charges of violating identical statute as in this case);
See opinion of District Judge in this case sustaining demurrer, *infra*.

II.

The identical statute in this case as it particularly concerns the crime of making "false entries" has been repeatedly both construed and upheld:

Cross v. *U. S.*, 132 U. S. 313;
Allis v. *U. S.*, 155 U. S. 116;
Coffin v. *U. S.*, 156 U. S. 433;
Cochran v. *U. S.*, 157 U. S. 285;
Coffin v. *U. S.*, 162 U. S. 661;
Agnew v. *U. S.*, 165 U. S. 36;
Dow v. *U. S.*, 82 Fed. 904;
U. S. v. *Young*, 128 Fed. 111;
Twining v. *U. S.*, 141 Fed. 41;
Hayes v. *U. S.*, 169 Fed. 101;
Cooper v. *U. S.*, 13 Fed. (2d) 16.

Where, then, the construction of a statute and its validity have been repeatedly adjudicated, the right to proceed by direct appeal from a district court on either of these grounds will no longer be recognized:

U. S. v. *Denison*, 60 App. D. C. 71, 74.

III.

The assignment of errors shows that this appeal is based on supposed errors of the District Court in construing the indictment.

This Court has repeatedly held that, on appeal or error, the construction of the District Court on the sufficiency of an indictment is binding and conclusive, and must and will be accepted by the Supreme Court:

U. S. v. *Miller*, 223 U. S. 599;
U. S. v. *Patten*, 226 U. S. 525;
U. S. v. *Winslow*, 227 U. S. 202;
U. S. v. *Yuginovich*, 256 U. S. 450;
U. S. v. *Colgate & Co.*, 250 U. S. 300.

The District Court's opinion is as follows:

> "Defendant's demurrer to the indictment is sustained on the authority of *Coffin* v. *United States*, 156 U. S. 432, and *Cooper* v. *United States*, 13 F. (2d) 16, the latter a Circuit Court of Appeals decision for this Circuit. The principle laid down in these cases is believed to be directly applicable to the *facts* in the present case. While what defendant is alleged in the indictment to have done would clearly appear to amount to misapplication of funds, he is not charged with this under the statute (12 U. S. C. A. 592), but solely with the making of a false entry, which is a concrete offense and not committed where, as here, the transaction entered, actually occurred and was entered exactly as it occurred."

On the very assignment of errors, therefore, it is plain that this Court has no jurisdiction of this appeal.

IV.

The Supreme Court of the United States held, in *Coffin* v. *U. S.*, 156 U. S. 433, construing the very statute here involved:

> "We think it is clear that the making of a false entry is a concrete offense which is not committed where the transaction entered actually took place, and is entered exactly as it occurred."

The District Court, construing the indictment, said that the transaction on which it was based

> "actually occurred and was entered exactly as it occurred."

If the Supreme Court, under its own decisions, *supra*, Par. III, cannot review the construction of the indictment, but is bound by it, then there is no substantial question left to be determined on this appeal, as the lower court, in its opinion, adopted the language of the Supreme Court construing the statute (*Coffin* case), and said:

> "The making of a false entry is a concrete offense and not committed where, as here, the transaction entered, actually occurred and was entered exactly as it occurred."

Respectfully submitted,

LUCIEN H. MERCIER,
Attorney for Appellee.

Service accepted this 12th day of January, A. D. 1933.

SIMON E. SOBELOFF,
Attorney for Appellant.

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MOTION TO DISMISS OR AFFIRM

Comes now the appellee, JOHN G. DARBY, and moves this Honorable Court to dismiss the appeal or affirm the judgment of the District Court in this cause; and, for reasons therefor says:

1. The right of direct appeal exists only where the construction or validity of a Federal statute is involved.

a. The Assignment of Errors show this appeal to be based on the supposed error of the

lower court in construing an indictment, and holding it insufficient in law, and not on error in construing a statute.

1. On an appeal, the ruling of the lower court on the sufficiency of an indictment cannot be disturbed, but must be adopted by the Supreme Court.

b. The construction of the Statute was not involved below, but merely the construction of the indictment.

2. The right of direct appeal no longer exists where, as in this case, the statute involved has been repeatedly construed and upheld.

3. In support of this motion appellee relies on its statement in opposition to jurisdiction filed herein, and the authorities therein cited.

LUCIEN H. MERCIER,
Attorney for Appellee.